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April 25, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: Policy and Rules Concerning the Interstate, Interexchange Marketplace
CC Docket No. 96-61

Dear Mr. Caton:

Transmitted herewith on behalf of WinStar Communications, Inc. ("WinStar"), are an original and eleven (11) copies of its Comments in the above-referenced proceeding. In addition, a paper copy of the Comments is being served on International Transcription Services, and a paper copy and a diskette are being served on Janice Myles of the Common Carrier Bureau.

Also enclosed is an extra copy of this letter and Comments. Please date-stamp the extra copy and return to the undersigned in the envelope provided.

If there are any questions concerning this matter, please contact me.

Very truly yours,

Morton J. Posner

Enclosures

cc: Janice Myles
ITS

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
Policy and Rules Concerning the	)	CC Docket No. 96-61
Interstate, Interexchange Marketplace	)	

COMMENTS OF WINSTAR COMMUNICATIONS, INC.

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Dated: April 25, 1996

SUMMARY

WinStar Communications, Inc. ("WinStar"), a local telecommunications services provider that uses wireless, digital millimeter wave technology, opposes a policy of mandatory detariffing for non-dominant interexchange carriers because:

- The Telecommunications Act of 1996 (the "Act") authorizes "forbearance," not elimination of tariff requirements;
- The public interest does not favor tariff elimination; and
- Such a policy is premature until the Commission, carriers, and customers gain relevant experience in the post-Act competitive marketplace.

WinStar supports a policy of permissive tariffing which it believes:

- Represents smart economics;
- Supports the Commission's current complaint process; and
- Reduces present administrative burdens.

Accordingly, WinStar urges the Commission to adopt a true forbearance policy by permitting non-dominant interexchange carriers voluntarily to comply with tariff filing requirements.

Before the
FEDERAL COMMUNICATIONS COMMISSION
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Interstate, Interexchange Marketplace	)	

COMMENTS OF WINSTAR COMMUNICATIONS, INC.

WinStar Communications, Inc. ("WinStar"), by its undersigned counsel, and pursuant to Section 1.415 of the Federal Communications Commission's ("FCC" or "Commission") rules, hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") regarding the interstate, interexchange marketplace.[1/] These comments focus principally upon the Commission's tentative conclusion to mandatorily detariff interstate common carrier services.

I. INTRODUCTION

WinStar is a publicly-held company whose stock is traded on the NASDAQ market system. It develops, markets, and delivers telecommunications services in the United States. Over the last five years, WinStar has grown rapidly.[2/] The Company's local telecommunications services are offered in 43 of the nation's largest metropolitan statistical areas. The Company provides local telecommunications services on a point-to-point basis using wireless, digital millimeter wave

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1/ *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96061, FCC 96-123 (Mar. 25, 1996) ("*NPRM*").

2/ WinStar had over 300 full-time employees in 1995, and expects to add significantly to its employee base in 1996.

capacity in the 38 gigahertz ("GHz") band, a configuration referred to by WinStar as Wireless Fiber℠. WinStar's operating companies have been approved for competitive local exchange carrier service operations in California, Florida, Illinois, Massachusetts, New York , Washington, and Tennessee and there are applications pending for such authority in a number of other states, including Arizona, Connecticut, Georgia, Maryland, Michigan, and Texas. WinStar also has received authority to operate as a competitive access provider in 21 states[3/] and has applications pending in a number of other states.[4/] This wireless backbone provides WinStar far greater flexibility and responsiveness than the traditional wireline networks of incumbent local exchange carriers. The passage of the Telecommunications Act of 1996 [5/] should hasten WinStar's ability to provide such competitive services.

In addition, a WinStar affiliate, WinStar Gateway, Inc., provides traditional long distance interexchange services on a resale basis throughout the United States. Another WinStar affiliate, WinStar New Media Company, Inc., provides information services and produces non-fiction video products primarily for the educational and historic content markets.

WinStar supports the Commission's efforts to promote the development of competition in all market segments of the telecommunications industry, as mandated by the Telecommunications Act of 1996. WinStar disagrees, however, with the Commission's tentative conclusion that it is

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[3/] California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New York, Ohio, Pennsylvania, Tennessee, Texas, Washington, and Wisconsin.

[4/] States with pending applications include Arizona, Louisiana, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Utah, and Virginia.

[5/] Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56 (1996) ("Act").

required under the Act to order forbearance from tariff filing for all non-dominant providers of interstate, interexchange service.[6/] WinStar respectfully suggests that the Act empowers the Commission to determine that the public interest and the promotion of competitive market conditions require permissive tariffing of interstate common carrier services. This would allow carriers such as WinStar the flexibility to capture the public interest benefits of tariffs, decrease the cost of the underlying service, foster competition, and protect consumers. For these reasons, the Commission should continue to permit, on an optional basis, tariff filings for all non-dominant providers of interexchange service.

II. MANDATORY DETARIFFING IS NOT AUTHORIZED BY THE ACT, IS INCONSISTENT WITH THE PUBLIC INTEREST AND IS PREMATURE

A. Section 10(a) of the Act Authorizes "Forbearance," Not Mandatory Detariffing

Section 10(a) of the Act states that the Commission "shall forbear from applying any regulation or provision" of the Communications Act of 1934 (including the tariff filing requirements set forth in Section 203 of the Communications Act) if the Commission determines: (i) enforcement is not necessary to ensure that common carrier practices are not unjust and unreasonably discriminatory; (ii) it is not necessary for the protection of consumers; and (iii) forbearance is consistent with the public interest.

Although it is clear that Congress intended the Commission to *forbear* from regulations under certain instances, nothing in Section 10(a) even remotely suggests that Congress intended that the Commission *prohibit* the filing of tariffs. Forbearance is defined as "refraining from doing something that one has a legal right to do." Black's Law Dictionary at 644 (1990). While

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6/ *NPRM* at ¶ 19.

the Commission may permit carriers to refrain from filing tariffs, it is without statutory authority to prohibit them from voluntary compliance with tariff requirements. Commission precedent supports this interpretation. In a previous experiment with tariff forbearance, the Commission stated that carriers subject to forbearance were "not required to file tariffs," not that they were forbidden from doing so.[7/] As discussed below, a permissive detariffing regime would afford carriers the flexibility to file tariffs to help ensure that the marketplace operates consistent with the public interest.

B. A Policy of Mandatory Detariffing is Not in the Public Interest

Section 10(a) provides that the Commission may forbear application of its tariff regulations if the following public interest showing is met:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in conjunction with that telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[8/]

WinStar respectfully suggests that mandatory detariffing currently is not in the public interest. Tariffs continue to protect carriers, consumers, and competition alike.

[7/] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Therefor*, 99 FCC 2d 1020, 1021 (1985).

[8/] 1996 Act at § 401 (adding § 10(a) of the Communications Act of 1934).

First, tariffs keep transaction costs low for carriers, thus enabling them to pass these substantial savings through to consumers. Tariffs display carrier rates and terms in a concise, public fashion. For many customers, tariff filings obviate the need for individual service contracts. Elimination of tariff filings would serve to increase customer costs as carriers incur greater costs in maintaining an individualized contractual relationship with each customer. Reduced transaction costs directly serve and protect consumers. For some customers, however, an individual service contract — which need not be subject to tariff requirements — is necessary. These contracts often rely, in part, on standard terms and conditions which may be contained within tariffs, and which are material to the contract. Elimination of tariff filings in this case would undercut these contracts by eviscerating some of their material terms.

Second, tariffs provide vital information to consumers and the telecommunications industry. Publication of rates and terms in tariffs enables consumers and competitors to compare products and services. This is information which consumers and competitors can (and do) obtain from one central source. As the competition in the telecommunications market increases, it will be increasingly difficult for consumers, and even carriers, to gather reliable product and service information. Information found in tariffs allows consumers to make informed choices about product offerings, and enhanced consumer knowledge spurs competitors to provide consumers with an increased array of options at ever competitive rates. Moreover, the availability of such pricing information betters the ability of smaller carriers (such as WinStar) to enter the market, enhancing competition.

Third, tariffs flag developments in, and outline the status of, interstate competition. Tariffs are an important tool which the Commission can and should use to monitor interstate

competition. The ability of the Commission to accomplish this task is even more important as the powerful Bell Operating Companies, with their entrenched customer bases and infrastructures, realign in the marketplace. This is particularly of importance to publicly traded new entrants such as WinStar, who bear considerable responsibility to its shareholders -- the very consumers whose protection is mandated by the Act.

Fourth, tariffs facilitate rapid price changes to enhance competition. Rather than impede "the introduction of new services, dampening competitive responses and ultimately encouraging price collusion through the forced publication of charges,"[9/] a tariff represents a rapid and efficient way for a carrier to adjust services and prices for all customers. In the absence of tariffs, the introduction of varied services and price changes might have to be renegotiated with all customers. It would be impossible to respond quickly to market changes. Moreover, small interexchange carriers (particularly resellers) rely on the tariffs of larger carriers for market pricing information to offer more competitive rates. The Commission's existing regulations both ensure the availability of service and pricing information through tariffs, and the ability to change services and prices quickly to respond to competition. Non-dominant interexchange carriers now file tariffs on one day's notice without cost support data. This regulation demonstrates the Commission's understanding that this market is robust and fast-changing and that its regulations can accommodate the marketplace.

9/ *NPRM* at ¶ 21 (citation omitted).

C. A Policy of Mandatory Detariffing is Premature

The complete elimination of all tariffing requirements is unwarranted and premature. Since the public interest standard of Section 10(a) has not yet been met, it is too soon for the Commission to require forbearance from tariff filing requirements for non-dominant interexchange carriers. Rather, prudence requires that the Commission revisit the issue after the new regulatory paradigm imposed by the Act (including regulations imposed by the Commission in this and related rulemakings) takes effect. Then the Commission would have the benefit of experience in the interaction between the Act and competition in the interstate marketplace. Until such time as the Commission, the industry, and consumers gain that experience, a permissive tariffing regime would best serve the public interest.

III. PERMISSIVE TARIFF FILINGS ARE IN THE PUBLIC INTEREST AND WILL SERVE TO REDUCE ADMINISTRATIVE BURDENS ASSOCIATED WITH CURRENT TARIFF FILING REGULATIONS

A. Permissive Tariffing (*i.e.*, Forbearance) Is Smart Economics

Permissive tariffing will afford carriers maximum flexibility to serve their customers and capitalize on an efficient method for contracting. It is not cost effective for every carrier (especially providers of resold interexchange long distance service) to execute a service contract with every customer, and not every carrier-customer relationship requires an individualized contractual relationship. Similarly, price competition is so fierce that carriers need to be able to react to changes in the market. Carriers also need the flexibility to protect their customers and themselves by filing rates and/or terms in tariffs when appropriate. Tariff filings allow carriers to respond to the market while providing certainty of terms and prices. As the Commission well knows, traditional long distance service is provided to a mass market. Permissive tariffing would

allow carriers, through the benefit of real world experience, to evaluate which tariff elements promote economic efficiencies and to capture those efficiencies. Experience may show that filing of rate ranges, simple contract terms, or some other tariff components are what is necessary in a competitive environment. Accordingly, the Commission should impose modest tariff rules (perhaps requiring only that tariffs, if filed, are to take effect on one day's notice) that provide each carrier maximum flexibility to determine over time the manner in which it will tariff its services. Some carriers might determine that a range of rate tariff is appropriate, while others may determine that exact rates are more appropriate for their service offerings or customer base. In other words, the Commission should let the market dictate contracting methodology allowing experimentation to take place. Imposition of mandatory detariffing would needlessly foreclose such experimentation.

B. The Commission's Complaint Process Relies Upon Information Obtained From Carriers' Tariff Filings

Tariff filings are part of a carefully constructed statutory scheme in which unjust and unreasonable charges may be investigated through a complaint process.[10/] This complaint process necessarily requires reliable information about services and rates which are included in tariffs. The Commission's concerns about abuse of the filed rate doctrine are misplaced.[11/] While tariffs can be changed quickly by carriers, tariffs bind carriers to charge rates they file. While the doctrine affords carriers some flexibility in pricing, it also provides consumers the protection of

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10/ *See* 47 U.S.C. §§ 206-08.

11/ *See NPRM* at ¶ 34 ("the absence of tariffs would eliminate possible invocation by carriers of the filed rated doctrine, which allows carriers certain rights unilaterally to change rates, terms, and conditions of contract tariffs").

price certainty. If carriers do not have the flexibility to file tariffs, they may be subject to claims of anti-competitive conduct or unjust or unreasonable charges which would be foreclosed by the information in a publicly filed tariff. Moreover, carriers would unnecessarily have to adduce evidence in a complaint proceeding that might otherwise be readily available in a tariff. The Commission, the competitive marketplace, and ultimately consumers, would be burdened by the result.

C. Permissive Tariffing Reduces the Present Administrative Burdens

Permissive tariffing would substantially reduce administrative burdens on both the Commission and carriers. Compliance with all current tariff requirements results in tariffs which are expensive to draft, file, and maintain. Elimination of the cost of filing full blown tariffs would benefit consumers in the form of lower prices for service. The Commission scarcely needs to be told that tariff filings burden its staff and its resources. We have identified a few of the benefits which tariffs provide. Permissive tariffing will afford carriers the opportunity to gain experience into what sorts of tariff publications are necessary in the competitive marketplace. The immediate benefit to the Commission will be to reduce the enormous flow of tariff filings to that amount which gives the Commission necessary information. Reduction of regulation to its critical mass can only serve the public interest.

CONCLUSION

While the Act empowers the Commission to undertake forbearance of tariff filing requirements, it does not authorize outright elimination of tariff filings. Mandatory detariffing is not forbearance, and it is not in the public interest. In contrast to the prohibition on tariffs that the Commission has proposed, the Commission should adopt a tariffing policy which imposes

minimum tariffing rules, and allows the marketplace the flexibility to determine whether and in what manner tariffing should occur. This is consistent with the new (de)regulatory paradigm embodied by the Telecommunications Act of 1996. At the very minimum, mandatory detariffing is premature (in light of the new regulatory paradigm), and must await until consumers, carriers, and the Commission gain experience in the post-Telecommunications Act marketplace. Tariffs serve numerous public interest functions including protection of consumers and enhancement of the competitive marketplace. A policy of permissive tariffing (true forbearance) would allow carriers the flexibility to capture those public interest benefits in the changing marketplace, while reducing the administrative burden of filings on the Commission.

Respectfully submitted,

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